In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 453

BILLY RAY GRIMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Northern District of Texas, following a jury trial, on count 4 of a five-count indictment (R. 303-311), charging that he conspired with two codefendants, Albert Meadows and Edward Driscoll, and with an unindicted person named Warren Gilbert, in violation of 18 U.S.C. 371 and 1952, to travel in interstate commerce and to use interstate mail and wire facilities with the intent to distribute the proceeds of a gambling enterprise conducted in violation

of Texas law.[1] On April 14, 1966, he was sentenced to two years' imprisonment, execution of the sentence was suspended, and he was placed on probation for four years (R. 365). The court of appeals affirmed (Pet. App. C).

The judgment of the court of appeals was entered on June 30, 1967 (R. 382). The petition for a writ of certiorari was filed more than 30 days subsequently, on August 4, 1967, and is thus out of time under Rule 22(2) of the Rules of this Court. In any event the petition presents no question which calls for further review.

The evidence adduced by the government may be summarized as follows:

On July 5, 1962, the defendant Driscoll drove James Jackson, an oil well drilling contractor, to a house in Irving, Texas, where a gambling game involving dice —an activity illegal under Texas law—was in progress (R. 42-43, 46-49, 92-93, 245-247). Petitioner was working behind the dice table—*i.e.*, on the side of the table occupied by the "stick" man (who retrieves the

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[1] Petitioner was also convicted on counts 1 and 3 (charging that he aided and abetted certain substantive violations of 18 U.S.C. 1952 by Driscoll and Meadows), but his convictions on those counts were reversed by the court of appeals because of insufficiency of the evidence to support them (R. 264, 303, 305-306; Pet. App. C 21-23). Count 2 did not involve petitioner. Count 5, which charged petitioner, Driscoll, and Meadows with another substantive offense, was dismissed at the trial on the government's motion (R. 212, 311). Driscoll and Meadows each pleaded guilty to certain substantive counts and the remaining counts (including the conspiracy count) were dismissed as to them (R. 271, 280-281, 300-301).

dice after a player has rolled them and then pushes them to the next player) and the "box" man (who collects the bets and pays off winners) (R. 50-52, 84, 95). He was not engaged as a player (R. 52). Jackson shot dice for three or four hours, lost $50,000, and gave personal checks in that total amount to the defendant Meadows, whom Jackson observed in and about the room during the proceedings (R. 48-50, 52-53). The next day, in petitioner's presence, Jackson discussed with Driscoll, Meadows, and the alleged co-conspirator Gilbert, the methods by which he might satisfy his $50,000 debt (R. 54-56, 99-101, 121). Gilbert, the vice-president of the Greenville Avenue State Bank, of Dallas, Texas, was introduced to Jackson by Meadows or Driscoll as "our banker" (R. 56). Jackson made arrangements to give Meadows an interest in certain oil well drilling operations in which he was engaged in partial payment of the debt (R. 55-57).

The following month Driscoll went to Billings, Montana—Jackson's home city—to try to collect part of the debt (R. 59-61). Driscoll told Jackson that Meadows "wanted payment on some of those checks" and asked Jackson when he would have some money for him (R. 60-61). On August 20, in part payment of the debt, Jackson purchased and gave to Driscoll a cashier's check in the amount of $5,000, payable—pursuant to an instruction which Gilbert had given Jackson when the matter was discussed in Texas—to the Greenville Avenue Bank (R. 61-62). On August 20 and 21, during and immediately following the

period of his negotiations with Jackson in Montana, Driscoll tried four times to reach petitioner by telephone in Dallas—twice successfully. Following one of the uncompleted calls, Driscoll placed and completed a call to Gilbert at the Greenville Avenue Bank (R. 143-147). Meadows later acknowledged to Jackson that he had received the $5,000 check (R. 61-67).

In October 1962, Joe Trigg, another oil well drilling contractor, of Oklahoma City, Oklahoma, was taken by Driscoll to a house in Arlington, Texas, where another dice game operated by Meadows was in progress (R. 72-73, 78-82, 93). Trigg shot dice, lost $7,000, gave Meadows his personal check in that amount in payment and returned to Oklahoma City (R. 80-83). Later Trigg agreed to give Meadows a cashier's check in lieu of his personal check (R. 84-85). On October 19, Trigg bought a $7,000 cashier's check, in Oklahoma City, payable to Meadows, delivered it there to an emissary of Meadows' sent from Texas, and took back his personal check (R. 85-89, 164). On October 22, Meadows took the $7,000 cashier's check to the East Dallas Bank and Trust Company, of which Gilbert was president, and told Gilbert that he wished to convert it into four smaller checks in order to "divide up the winnings" (R. 104-105). After Meadows had endorsed the $7,000 check, four smaller checks were issued in exchange for it—including one for $1,400 payable to petitioner, another to Driscoll for $2,800, and the remaining two for $1,400, made out to Meadows and a fourth individual (R. 106-109). Petitioner,

accompanied by Meadows, cashed his check the following day (R. 109-111, 203-204).

Petitioner and Meadows jointly owned the house in Arlington where Trigg incurred his loss (R. 125-126, 130-133) and had at one time maintained a partnership checking account for a "private club" located at that address (R. 96-98). Gilbert had observed petitioner both at the Irving and at the Arlington houses while gambling with dice was going on—five times at the latter establishment; in each instance petitioner was conducting the game, either as the "stick" or the "box" man (R. 93-95, 111-112). On at least one occasion Gilbert had seen petitioner extend credit to a player (R. 111-112). Petitioner gave his occupation as "gaming", and his business address as "various", in his 1962 income tax return (R. 189-190).

The court of appeals rightly held, contrary to petitioner's principal contention in this Court (Pet. 2, 6-8), that the evidence of a pattern of joint criminal activity was sufficient to support his conviction on the conspiracy count. There was ample evidence for the jury to conclude that petitioner was a co-proprietor with Meadows (and possibly with Driscoll as well) of the gambling enterprises which the evidence showed were conducted at the houses in question. Petitioner was the joint owner with Meadows of one of the houses; he conducted the games; and he shared in the profits. He had a "stake in the venture". Cf. *Direct Sales Co.* v. *United States*, 319 U.S. 703, 713; *Ingram* v. *United States*, 360 U.S. 672, 676-677. Driscoll's telephone calls and attempted

calls to petitioner from Montana, following his successful interstate journey to collect from Jackson a portion of the latter's $50,000 gambling losses, warranted the jury's conclusion that petitioner was well aware of Driscoll's mission, concurred in it even if indeed he had not instigated it, and would benefit from it financially—as he was later to benefit from Trigg's $7,000 payment to Meadows. The inference was fortified by the fact that one of the uncompleted calls was followed immediately by a call to Gilbert, the gamblers' "banker", who the evidence showed was at the focus of the conspiracy, and at whose direction the cashier's check which Jackson delivered to Driscoll was made payable to the bank of which Gilbert was an officer. Similarly, petitioner's subsequent sharing in the fruits of Trigg's losses at the gambling parlor which he co-owned was evidence to support the inference that petitioner was likewise aware of, and agreed to, the interstate transaction by which Trigg discharged his indebtedness to Meadows.

Assuming, *arguendo*, that the court of appeals was right in concluding that the evidence fell short of what was required to sustain petitioner's conviction as an aider and abetter of the substantive offenses charged in counts 1 and 3—Driscoll's interstate journey and Meadows' interstate transportation of the Trigg check (the offenses, in substance, that were charged as the objects of the conspiracy)—it would not necessarily follow, as petitioner contends (Pet. 3-7), that the evidence was also insufficient to support the conspiracy conviction. The elements of aiding and abetting are not coterminous with those of conspiracy.

"Aiding, abetting, and counseling", as this Court observed in *Pereira* v. *United States*, 347 U.S. 1, 11, "are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy." The court of appeals here properly noted that "[t]he jury was not unreasonable in concluding, as it obviously did, that a conspiracy to lure out of state gamblers would most likely lead to the collection of gambling debts thus incurred by some form of interstate travel or communication and that Grimes foresaw such an eventuality" (Pet. App. C 24). This level of participation is sufficient to make petitioner a conspirator to violate the federal laws against the use of interstate facilities for promoting unlawful gambling activities, and the court of appeals was correct in affirming the jury's findings to that effect.

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

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